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## A Call for Reform of Recent Immigration Legislation

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## A CALL FOR REFORM OF RECENT IMMIGRATION LEGISLATION

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Jason H. Ehrenberg\*

*The Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 dramatically limit the procedural rights of aliens who have been convicted of serious crimes. Consequently, aliens who have immigrated to the United States to escape persecution in their homelands are deported without adequate hearing or appeal. This Note argues that the laws violate international obligations and Constitutional law. It advocates amending the laws to give the Attorney General discretion over deportation decisions, eliminating retroactive application of deportation for aggravated felons, and reinstating judicial review of deportation or exclusion decisions.*

### INTRODUCTION

In 1996, Congress passed two laws that drastically reformed immigration policy in the United States: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>1</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>2</sup> The Acts were aimed at alleviating the negative public response to America's growing population of illegal immigrants.<sup>3</sup> Although the legislative history of the IIRIRA suggests more than one purpose for the legislation,<sup>4</sup> the most dramatic and significant

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1. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C.) [hereinafter AEDPA].

2. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.) [hereinafter IIRIRA].

3. See William C.B. Underwood, Note, *Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases*, 72 IND. L.J. 885, 885 (1997) (stating that IIRIRA was passed to "address the public backlash against America's growing population of illegal residents"). The AEDPA and IIRIRA amend certain provisions of the Immigration and Nationality Act of 1954 (codified at 8 U.S.C. § 1101, et. seq.).

4. The conference report stated the IIRIRA was enacted to:

amend the Immigration and Nationality Act to improve deterrence of illegal immigration to the United States by increasing border patrol and investigative personnel, by increasing penalties for alien smuggling and for document fraud, by reforming exclusion and deportation law and procedures, by improving the verification system

reform measures fell under the category of exclusion and deportation law. As of April 1, 1997, immigrants seeking entry into the United States face tougher entry requirements and have little or no chance of obtaining judicial review of Immigration and Naturalization Service (INS) determinations which exclude them from entering the country or deport them once already in the United States.<sup>5</sup> These new measures are draconian in nature and far exceed what was necessary to address the immigration problem.

In the mid-1990s illegal immigration was a significant issue in the United States.<sup>6</sup> Enforcement of the civil and criminal provisions of immigration laws was an expensive task.<sup>7</sup> Between four and five million illegal aliens resided in the United States in 1996.<sup>8</sup> It is estimated that another 400,000 aliens gain access to the U.S. each year.<sup>9</sup> The economic and social costs created by illegal immigration were great.<sup>10</sup> Congress saw a clear need to make border patrols tougher and to make INS processes more efficient.<sup>11</sup>

However, the measures taken by Congress far exceed what was necessary to achieve those goals. They may create significant risks that asylum seekers and refugees, fleeing religious and political persecution, will be returned to their homelands to endure further persecution.<sup>12</sup> The measures deny immigrants judicial review of INS deportation decisions.<sup>13</sup> In this respect, certain provisions of

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for the eligibility for employment, and through other measures, to reform the legal immigration system and facilitate legal entries into the United States . . . .

H.R. CONF. REP. NO. 104-828, at 1 (1996).

5. See, e.g., Paul S. Jones, Note, *Immigration Reform: Congress Expedites Illegal Alien Removal and Eliminates Judicial Review from the Exclusion Process*, 21 NOVA L. REV. 915, 919-20 (1997) (stating that INS decisions regarding deportation or exclusion are no longer subject to judicial review).

6. See Dulce Foster, Note, *Judge, Jury and Executioner: INS Summary-Exclusion Power Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 82 MINN. L. REV. 209, 210 (1997) (stating that few would argue that the government's focus on immigration policy is misplaced and that Congress has a legitimate interest in protecting its citizens from threats to national security); Jones, *supra* note 5, at 916 (noting that the economic costs of illegal immigration may run as high as thirty billion dollars per year).

7. See Jones, *supra* note 5, at 916-17 (suggesting that reimbursement from states such as the request by Florida for reimbursement of one billion dollars it spent per year for education, medical care, and a justice system for illegal immigrants prompted Congress to make changes in the immigration laws).

8. See *id.* at 915.

9. See *id.* at 916.

10. See *id.* (stating that for every twenty undocumented aliens working in the United States, thirteen Americans are out of jobs, and that unemployment payments, services, and lost taxes cost the government thirty billion dollars per year).

11. See H.R. CONF. REP. NO. 104-828, at 1 (1996).

12. See Celia W. Dugger, *In New Deportation Process, No Time, or Room, for Error*, N.Y. TIMES, Sept. 20, 1997, at A1.

13. See IIRIRA §§ 301 and 302; discussion *infra* Part I.C.

the AEDPA and IIRIRA directly conflict with obligations established under international law<sup>14</sup> and with due process guarantees found in the Constitution.<sup>15</sup> Finally, the new laws illustrate the attitude of this nation towards people in need: "How we treat asylum seekers is a reflection of who we are as a nation. . . . The law was not just for the benefit of the country. It was also supposed to help those who needed help. That's where we have fallen short."<sup>16</sup>

This Note discusses key provisions of the AEDPA and IIRIRA that: (1) deny asylum seekers full hearings with legal representation; (2) expand the definition of aggravated felonies and other criminal offenses; and (3) eliminate the right to judicial review of many deportation decisions. Part I of the Note describes the key provisions of the new legislation, sections 321, 305, 301, 302, and 306 of the IIRIRA, and section 440 of the AEDPA. Part II explores recent case law dealing with these provisions. Part III advocates for amendment of the AEDPA and IIRIRA. This Note will show that these Acts will have profound effects on immigrants and their families, and that the legislation violates both international law and the Constitution of the United States.

## I. KEY PROVISIONS OF IIRIRA AND AEDPA AND THEIR POLICY IMPLICATIONS

### A. IIRIRA Section 321(a)(3)

1. *The Law*—Section 321(a)(3) of the IIRIRA amends the definition of aggravated felony<sup>17</sup> as it appeared in the Immigration

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14. More specifically, these provisions come in direct conflict with the United States' obligations as established under the 1967 United Nations Protocol Relating to the Status of Refugees. See discussion *infra* Part I.B.2.

15. See U.S. CONST. amend. V (guaranteeing that no person shall be deprived of life, liberty, or property without due process of law); discussion *infra* Part I.B.2.

16. Mirta Ojito, *Inconsistency at I.N.S. Complicates Refugees' Asylum Quest*, N.Y. TIMES, June 22, 1998, at B5 (quoting Leonard S. Glickman, Executive Vice President of the Hebrew Immigrant Aid Society in Manhattan).

17. A felony is "[a] crime of a graver or more serious nature than those designated as misdemeanors; e.g., aggravated assault (felony) as contrasted with simple assault (misdemeanor)." BLACK'S LAW DICTIONARY 617 (6th ed. 1991). Thus, felonies are considered to be serious crimes. In 1988, Congress further distinguished such crimes and created, for the first time, the category of aggravated felony. See Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4469 (1988) (defining "aggravated felony"). This was done largely to weed out the "worst criminals" for special punishment and treatment under the law. See Kari Converse, *Criminal Law Reform: Defending Immigrants in Peril*, CHAMPION, Aug. 21, 1997, at 10, 11.

and Nationality Act (INA) of 1952.<sup>18</sup> The amendment reclassifies most traditional felonies as aggravated felonies.<sup>19</sup> Previously, only murder, drug trafficking, firearms trafficking, and crimes of violence punishable by imprisonment of at least five years were aggravated felonies.<sup>20</sup> The IIRIRA adds to the definition of aggravated felony thefts, burglaries, crimes of violence punishable by a sentence exceeding one year, rape, sexual abuse of a minor, money laundering, fraud or tax evasion of \$10,000 or more, kidnapping, child pornography, RICO offenses, pimping, and document trafficking.<sup>21</sup> This new definition of aggravated felonies applies retroactively.<sup>22</sup>

This broad reform will cause a significantly greater number of immigrants who have been convicted of crimes to suffer grave consequences.<sup>23</sup> For political asylum seekers, removal based on this expanded definition of aggravated felony could mean death upon return to their homeland.<sup>24</sup>

2. *Retroactive Application*—The most troublesome aspect of section 321(a) is its retroactive application. Consider a hypothetical case. An alien comes to the United States in 1990 from his homeland, seeking refuge from political or religious persecution. One day, he takes a ride with a friend who, unbeknownst to him, has a gun and a large amount of marijuana in the trunk of his car. The police pull the friend over for speeding, discover the drugs and the gun, and arrest both men in the car. The refugee's court-appointed lawyer convinces him to cooperate with the authorities and plead guilty to the felony charges to avoid jail time. The refugee, no expert in American criminal law, agrees and receives a suspended sentence. He now has a felony on his record.

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18. The INA (also called the McCarran-Walter Act or McCarran Act) was signed into law on June 27, 1952. See Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) [hereinafter INA]. The purpose of the INA was to: (1) provide for deportation of aliens convicted in the U.S. of certain criminal offenses; (2) afford aliens judicial procedure in both exclusion and deportation proceedings while maintaining the national security and the protection of the social and economic welfare of the American public; and (3) remove any fear that certain religious, racial, or political persecutees would be arbitrarily excluded from this country. See H.R. CONF. REP. NO. 82-2096 (1952), reprinted in 1952 U.S.C.C.A.N. 1753, 1754.

19. See IIRIRA 321(a)(3); Converse, *supra* note 17, at 11.

20. See Converse, *supra* note 17, at 11.

21. See IIRIRA § 321(a)(3); *Id.* at 11–12. The legislative history and the text of the IIRIRA both state that “[t]he amendments made by this section shall apply on or after the date of the enactment of this Act, regardless of when the conviction occurred. . . .” H.R. CONF. REP. NO. 104-828, at 84 (1996). See discussion *infra* Part I.A.2 about retroactive application of the new definition of aggravated felony.

22. See IIRIRA § 321(a)(3).

23. See Converse, *supra* note 17, at 12.

24. See *id.*

Before the enactment of the IIRIRA, the Attorney General had discretion to withhold deportation of this alien if deportation would put him in imminent peril.<sup>25</sup> Under IIRIRA sections 305 and 321, the Attorney General no longer has the discretion to withhold deportation, because a convicted aggravated felon is considered a per se threat to the American community.<sup>26</sup> Due to the expanded definition of aggravated felony and the removal of discretion from the Attorney General in cases involving criminal aliens, this innocent man will be returned to his homeland to face the persecution from which he fled. Seven years after he pleads guilty to a crime he did not commit, he is sent home.

The INS may identify an alien believed to be statutorily eligible for removal,<sup>27</sup> charge that alien with deportability as an aggravated felon, and decide whether to issue a final order of removal or refer the alien for removal proceedings, while offering only a brief opportunity to rebut the charges.<sup>28</sup> This process makes the INS the only decisionmaker and usually occurs while aliens are incarcerated and have little access to legal counsel, translators, or immigration information.<sup>29</sup> The Attorney General's gatekeeping power (discretion to withhold deportation) has been removed as a procedural protection for such aliens. After passage of the IIRIRA, the power to deport lies squarely in the hands of the INS.<sup>30</sup>

Congress intended to rid the country of illegal aliens who were committing crimes and imposing costs on the U.S. criminal justice system.<sup>31</sup> It is difficult to believe, however, that Congress contemplated returning asylum seekers, such as the refugee in the example above, to persecution.

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25. See AEDPA, Pub. L. No. 104-132, § 413(f), 110 Stat. 1214, 1269, (1996). If an alien's freedom or life would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion in the country to which the alien would be deported, the Attorney General could withhold deportation prior to the IIRIRA. See *id.*

26. See IIRIRA, Pub. L. No. 104-208, §§ 305, 321, 110 Stat. 3009-546, 602, 627-28.

27. There are many ways that the INS may institute deportation proceedings against an alien. For instance, some aliens could enter the U.S. as visitors and remain here longer than permitted. In such instances, the INS will either offer voluntary departure or commence deportation proceedings against the alien. See *INS v. Cardoza-Fonesca*, 480 U.S. 421, 424 (1987) (discussing why deportation proceedings were commenced against a Nicaraguan citizen living illegally in the United States); *INS v. Stevic*, 467 U.S. 407, 409 (1984) (discussing circumstances under which INS came to initiate deportation proceedings against a Yugoslavian citizen).

28. See Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 287 (1997) (discussing this power of the INS).

29. See *id.*

30. See *id.* (arguing that the prosecuting agency is now the final decisionmaker in deportation cases).

31. See H.R. CONF. REP. NO. 104-828, at 1 (1996).

*B. IIRIRA Section 305*

1. *The Law*—Under the INA and AEDPA, the Attorney General of the United States had the discretion to withhold the deportation of criminal aliens in certain instances.<sup>32</sup> Prior to the enactment of the IIRIRA, refugees were protected from forced return to countries where they faced threats to life or freedom.<sup>33</sup> Section 305 of the IIRIRA curtailed this discretion and invoked automatic deportation.<sup>34</sup> Section 305 states that an alien who has been convicted of an aggravated felony (as newly defined in IIRIRA section 321) is now deemed a per se danger to the American public and is therefore ineligible for relief from the Attorney General.<sup>35</sup>

2. *IIRIRA Section 305 Violates International Law*—The United States breaches international law by enforcing section 305. The United States has violated specific provisions of at least two refugee conventions: the 1967 United Nations Protocol Relating to the Status of Refugees<sup>36</sup> and the 1951 United Nations Convention Relating to the Status of Refugees<sup>37</sup> (the provisions of which were adopted by the United States through the 1967 Refugee Protocol), along with the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>38</sup>

The 1951 United Nations Convention Relating to the Status of Refugees (Convention) extends protections to international refugees.<sup>39</sup> The Convention defines a “refugee” as an individual who

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32. See AEDPA, § 413(f), 110 Stat. 1214, 1269 (1996).

33. See AEDPA § 413(f) (protecting refugees from forced return to countries where they face a threat to life or freedom). This provision temporarily fulfills the United States' international obligations as established under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention Relating to the Status of Refugees (of which the U.S. is signatory).

34. See IIRIRA § 305(a).

35. See IIRIRA § 305 (stating that “an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime”).

36. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 268 [hereinafter Refugee Protocol] (adopting Articles 2 through 34[2] of the Convention Relating to the Status of Refugees).

37. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

38. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 23 I.L.M. 1027 [hereinafter Torture Convention].

39. See Refugee Convention, *supra* note 37; see also Bobbie Marie Guerra, *A Tortured Construction: The Illegal Immigration Reform and Immigrant Responsibility Act's Express Bar Deny-*

has a well-founded fear of persecution in his or her country of origin based on race, religion, nationality, membership in a particular social group, or political opinion.<sup>40</sup> The Convention establishes what is known as the obligation of *nonrefoulement*.<sup>41</sup> Under the principle of *nonrefoulement*, no contracting nation shall return a person classified as a refugee to a country where his life or freedom is threatened on account of race, religion, nationality, membership in a particular social group, or political opinions.<sup>42</sup>

Article 1(F) of the Convention contains a list of activities that prohibit one from gaining refugee status.<sup>43</sup> Article 33(2) of the Convention allows a contracting nation to return a refugee to his home country if he has been convicted of a "particularly serious crime"<sup>44</sup> and has been found to constitute a danger to the community, even if that person faces persecution upon return to the home country.<sup>45</sup> Commentators have suggested that the drafters of the Convention attempted to balance the interests of countries in securing the safety of their communities and the interests of refugees in escaping persecution in their homelands.<sup>46</sup>

In 1968, the United States signed the United Nations Protocol Relating to the Status of Refugees (Refugee Protocol),<sup>47</sup> which adopted the minimum standards of protection developed under

*ing Criminal Aliens Withholding of Deportation Defies the Principles of International Law*, 28 ST. MARY'S L.J. 941, 951-52 (1997) (stating that the convention arose out of increasing international concerns for refugees due to events surrounding World War II).

40. See Refugee Convention, *supra* note 37, at art. 1, para. A, 19 U.S.T. at 6261, 189 U.N.T.S. at 152.

41. See *id.*

42. See Guerra, *supra* note 39, at 954. Guerra notes, however, that the *nonrefoulement* obligation is not mandatory in certain circumstances. See also *infra* note 39 and accompanying text.

43. See Refugee Convention, *supra* note 37, at art. 1, para. F, 19 U.S.T. at 6263-64, 189 U.N.T.S. at 156. These activities include committing war crimes or acting contrary to the purposes of the Convention.

44. Unfortunately, there is no internationally recognized definition of a "particularly serious crime." In *In re Frentescu*, 18 I. & N. Dec. 244, 246 (B.I.A. June 23, 1982), the Board of Immigration Appeals attempted to set forth the factors to be considered by courts (on a case-by-case basis) to determine whether a crime is a "particularly serious crime." The four factors follow: (1) the nature of the crime; (2) the circumstances and underlying facts of the conviction; (3) the type of sentence imposed; and (4) the degree of dangerousness the alien poses to the community. See *id.* at \*8; see also Guerra, *supra* note 39, at 959. Many crimes that would not meet the definition of "particularly serious crime" are considered aggravated felonies under the IIRIRA.

45. See Refugee Convention, *supra* note 37, at art. 33, para. 2; Guerra, *supra* note 39, at 954-55.

46. See Guerra, *supra* note 39, at 955 n.4. Thus, the argument continues, deportation determinations should balance these interests on a case-by-case basis rather than use formalistic, objective criteria that the United States has adopted under IIRIRA § 305.

47. Refugee Protocol, *supra* note 36; see also Guerra, *supra* note 39, at 956.

Article 33(1) of the Convention.<sup>48</sup> A nation becoming a party to the Refugee Protocol agrees to afford protections to refugees as required by Article 33(1) of the Convention.<sup>49</sup> By signing on to the Refugee Protocol,<sup>50</sup> the United States adopted Article 33(1) and agreed to withhold the deportation of refugees who could face imminent persecution in their homelands unless they fit into the Article 33(2) exception.<sup>51</sup>

By eliminating the Attorney General's discretion to withhold deportation of aliens convicted of aggravated felonies, Congress has ensured that the new U.S. immigration law conflicts with the terms of Article 33(1) of the Convention and violates the protection of refugees (criminal or not) as required by the 1967 Refugee Protocol. Other signatories to the refugee conventions may follow the lead of the United States and deny refugees similar protections. The United States sets a poor example for the rest of the world by violating the terms of international conventions that proscribe this legislation.

In *Sale v. Haitian Centers Council, Inc.*, the Supreme Court addressed the issue of whether the 1980 amendments to the Immigration and Nationality Act (INA) violated Article 33 of the Convention and whether Article 33 has an extraterritorial effect and can be applied to refugees captured before they actually entered the United States.<sup>52</sup> While the majority concluded that Article 33 did not preclude the INS from returning refugees captured outside U.S. borders to their homelands, Justice Blackmun's dissent states that Article 33 of the Refugee Convention creates a straightforward obligation on the part of signatory states not to "expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be

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48. See Refugee Protocol, *supra* note 36 (adopting the fundamental principals of the Refugee Convention).

49. See Refugee Protocol, *supra* note 36, art. I, para. 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268.

50. The United States agreed to comply with the substantive provisions of Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees when it signed on to the 1967 Protocol. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987) (citing 19 U.S.T. 6223, 6259-6276, T.I.A.S. No. 6577 (1968)). Although the United States is not a signatory to the 1951 Convention itself, in acceding to the 1967 Refugee Protocol, it bound itself to comply with Articles 2 through 34 of the Convention. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 n.19 (1993) (citing *INS v. Stevic*, 467 U.S. 407, 416 (1984)).

51. In other words, by acceding to the Refugee Protocol, the United States has agreed to uphold the principle of *nonrefoulement*, embodied in Article 33 of the Refugee Convention and adopted in the Refugee Protocol.

52. See *Sale*, 509 U.S. at 156. This brief discussion of the 1980 Amendments is being used as an analogy. Justice Blackmun's reasoning can be applied to the discussion at hand.

threatened."<sup>53</sup> Under Justice Blackmun's interpretation of Article 33, the United States violates the terms of the Convention by expelling refugees already within its borders. By enacting IIRIRA section 305 and allowing the INS to return refugees to "territories where [their lives or freedoms] would be threatened,"<sup>54</sup> following Blackman's interpretation, Congress and the Executive Branch violate international law.

The new immigration laws also violate the 1984 Torture Convention which the United States has signed.<sup>55</sup> The principle of *nonrefoulement* is expressed in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>56</sup> Signatories to this convention have agreed to withhold the deportation of individuals who are in substantial danger of being subjected to torture.<sup>57</sup> IIRIRA section 305 violates this *nonrefoulement* provision in the same way that it violates Article 33(1) of the Refugee Convention.

### C. IIRIRA Sections 301 and 302

Under the INA, the legal rights of aliens meeting the statutory requirements for removal depended on whether they were classified as "deportable" or "excludable" aliens.<sup>58</sup> Aliens who entered the United States, whether through lawful means or otherwise, were treated as "deportable."<sup>59</sup> Once deemed "deportable" by the INS, aliens had extensive procedural protections before and during the course of removal.<sup>60</sup> In contrast, aliens who had not yet entered the country were labeled "excludable" and received fewer procedural protections than their deportable counterparts.<sup>61</sup>

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53. *Id.* at 190 (Blackmun, J., dissenting) (citing Article 33.1 of Refugee Convention).

54. *Id.* at 192.

55. See Torture Convention, *supra* note 38; Guerra, *supra* note 39, at 969 (discussing possible violations).

56. Torture Convention, *supra* note 38.

57. See Guerra, *supra* note 39, at 971 ("Article 3 of the Torture Convention states that a country cannot expel, return, or extradite an individual to a State where he or she would be in danger of being tortured.") (citing Torture Convention, art. 3).

58. See INA, 8 U.S.C. § 1101, et. seq.; Jones, *supra* note 5, at 917-18 (discussing the rights of "deportable," as compared to "excludable," aliens).

59. See *id.*

60. See *id.*; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (stating that aliens who have entered the United States, even illegally, "may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law").

61. See *id.*

“Deportable” aliens had the right to advanced notice of charges against them and to a hearing before an immigration judge where the burden of proof was placed on the government.<sup>62</sup> Additionally, “deportable” aliens were entitled to federal appellate review of final deportation orders entered against them.<sup>63</sup> Thus, “deportable” aliens were afforded a reasonable chance of a fair determination.

Section 302 of the newly-enacted IIRIRA amends the INA to give INS agents the power to deport some classes of aliens without a trial or even an administrative hearing.<sup>64</sup> In many instances, when the alien faces no credible fear of persecution upon deportation, all the INS must do is grant the alien a brief screening interview with no opportunity for appeal.<sup>65</sup> The new procedure is referred to as “summary exclusion” or “expedited removal.”<sup>66</sup>

As the law now stands, “no court shall have jurisdiction to review . . . any individual determination or to entertain any other cause or claim,” arising from the enacted removal process.<sup>67</sup> The deportable alien no longer has the right to federal appellate review, and federal appellate courts no longer have the jurisdiction to enter relief.<sup>68</sup> Though there were two classes of aliens who received two different levels of procedural due process rights under the INA,<sup>69</sup> the IIRIRA lumps the “excludable” and the “deportable” aliens into one class of aliens with little or no chance of obtaining procedural due process. The INS may now expel or refuse to admit aliens without regard to the procedural rights that were historically granted to aliens.<sup>70</sup>

Section 301 of the IIRIRA also authorizes INS agents to summarily remove “excludable” aliens found in the United States and restricts judicial review of those determinations.<sup>71</sup> Thus, both provi-

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62. See INA, 8 U.S.C. § 1101, et. seq.; Jones, *supra* note 5, at 918 (citing 3A AM. JUR. 2D *Aliens and Citizens* § 1249 (1986)).

63. See 3A AM. JUR. 2D *Aliens and Citizens* § 1247 (1986).

64. See IIRIRA, Pub. L. No. 104-208, § 302, 110 Stat. 3009-546, 581 (1997).

65. See *id.*

66. See Carol Leslie Wolchok, *Demands and Anxiety: The Effects of the New Immigration Law*, 24 HUM. RTS., Spring 1997, at 12 (summarizing the changes in IIRIRA and its impact on the legal and immigrant communities); see also Ojito, *supra* note 16, at B1 (stating that since the new law took effect, the INS has detained all asylum seekers upon arrival in this country and required them to go through a procedure called “expedited removal”).

67. Jones, *supra* note 5, at 920 (citing 8 U.S.C. § 1252(a)(2)(A)).

68. See *Skutnick v. INS*, 128 F.3d 512, 514 (1997) (holding that the court no longer has jurisdiction to provide the requested relief); discussion *infra* Part II.

69. See Foster, *supra* note 6, at 224 (stating that the “INA granted a number of privileges to aliens in deportation proceedings not accorded to aliens in exclusion proceedings”).

70. See *id.* at 228.

71. See Jones, *supra* note 5, at 921.

sions increase the chance that refugees and asylum seekers will be forcefully returned to face persecution in their homelands.

*D. AEDPA Section 440(a) and IIRIRA Section 306*

1. *The Law*—AEDPA section 440(a), amending section 106(a)(1) of the INA, states that “[a]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense . . . shall not be subject to review by any court.”<sup>72</sup> This new provision is analogous to IIRIRA section 302 in that it denies aliens access to U.S. courts to seek review of deportation orders. Section 440(a) precludes all forms of judicial review, including habeas corpus review.<sup>73</sup>

Section 306 of the IIRIRA further amends INA section 106(a)(1). It states that “[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense.”<sup>74</sup> The effect of section 306 is to further restrict judicial review of INS orders removing criminal aliens. Both provisions suggest a Congressional intent to punish aliens and limit their rights in the United States.

2. *Provisions Violate U.S. Constitutional Law*—Traditionally, aliens facing deportation or exclusion from the United States had recourse to habeas corpus challenges to determine the legality of their removal or exclusion.<sup>75</sup> As discussed above, provisions of the IIRIRA and AEDPA regarding the removal and exclusion of aliens preclude judicial review.<sup>76</sup>

The United States Supreme Court has determined that admission into the United States is a privilege rather than a right.<sup>77</sup> Aliens who have already entered the United States, however, traditionally have had the right to judicial review of INS deportation

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72. AEDPA § 440, 110 Stat. 1214, 1276-77 (1996).

73. See Trevor Morrison, Note, *Removed from the Constitution? Deportable Aliens' Access to Habeas Corpus Under the New Immigration Legislation*, 35 COLUM. J. TRANSNAT'L L. 697, 702 (1997).

74. IIRIRA § 306 (a) (2).

75. See Morrison, *supra* note 73, at 721.

76. See, e.g., AEDPA § 440 and IIRIRA §§ 302, 321 (providing that all final orders of deportation against an alien who is deportable by reason of having committed a criminal offense shall not be subject to review by any court).

77. See United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); see also Jones, *supra* note 5, at 928 (stating the Supreme Court held in *Knauff* that admission into the United States is a privilege).

determinations. The Supreme Court stated that “[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”<sup>78</sup> Thus, criminal aliens facing removal from the United States historically have been afforded habeas corpus relief to challenge the legality of INS determinations.<sup>79</sup>

The IIRIRA and AEDPA provisions regarding removal of these criminal aliens fail to provide aliens procedural due process. Although criminal aliens do not have an automatic right to admission into the United States, they should have a right to the same protections that American-born criminals receive once here, because they receive the same punishments.

## II. RECENT CASE LAW AND COURT INTERPRETATION

There is confusion and disagreement between federal appellate and district courts over the correct interpretations of key provisions of the AEDPA and IIRIRA.<sup>80</sup>

In *Vargas v. Reno*,<sup>81</sup> the U.S. District Court for the Southern District of California held that Congress cannot bar deportable aliens from all avenues of judicial relief.<sup>82</sup> Jose Vargas immigrated to the United States from Mexico in 1969 when he was one month old and became a legal permanent resident of the United States.<sup>83</sup> His entire family lives in the United States. Vargas obtained his education in the United States.<sup>84</sup> In 1991, Vargas was convicted of a felony sale of marijuana.<sup>85</sup> After being convicted of two other misdemeanor offenses, the INS obtained a deportation order against him, and he was ordered to show cause why he should not be deported to Mexico in 1995.<sup>86</sup> An INS immigration judge granted Vargas’ petition for a waiver of deportation, finding that it would

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78. *Reno v. Flores*, 507 U.S. 292, 306 (1993).

79. *See Morrison*, *supra* note 73, at 721.

80. This discussion is by no means exhaustive and the reader should *not* assume that the opinions below are representative of those of the entire federal judiciary.

81. 966 F. Supp 1537 (S.D. Cal. 1997) (stating that aliens have a right not to be deported without due process of law, which “can only be guaranteed if there is judicial review of deportees’ constitutional claims”).

82. *See id.* at 1541.

83. *See id.* at 1540.

84. *See id.*

85. *See id.*

86. *See id.*

be too harsh to deport Vargas because he had lived in the United States his entire life and because all of his family lived here.<sup>87</sup>

The INS appealed the decision. Seven months later, the AEDPA was signed into law. Following AEDPA section 440, which applies retroactively to exclude aliens convicted of certain felony offenses from waiver of deportation petitions,<sup>88</sup> the Board of Immigration Appeals (BIA) ordered Vargas' deportation.<sup>89</sup> Vargas filed suit in U.S. District Court to enjoin the government from deporting him, seeking a declaration that AEDPA section 440 should not be applied retroactively and that section 440 was unconstitutional.<sup>90</sup>

The District Court found that "[a]liens have a Fifth Amendment right not to be deported without due process of law, and this can only be guaranteed if there is judicial review of deportees' constitutional claims."<sup>91</sup> The Court further stated that "Congress must not have intended to suspend the right of aliens in imminent danger of deportation to petition the courts for a writ of habeas corpus."<sup>92</sup> Finally, the court held that AEDPA section 440 does not preclude courts from reviewing plaintiffs' constitutional claims upon a petition for writ of habeas corpus.<sup>93</sup>

However, in *Exoum v. INS*,<sup>94</sup> the Fifth Circuit held that it lacked jurisdiction under the IIRIRA to review claims for discretionary relief.<sup>95</sup> Since the BIA had entered its final order in the alien's case in November of 1996, the court found that it lacked jurisdiction to review the alien's claim that the BIA erred in denying his request not to be deported.<sup>96</sup> The court bowed to the new legislation and prevented the immigrant from seeking review of the INS determinations against him.

In *Elboukili v. INS*,<sup>97</sup> the Tenth Circuit upheld a final order of the INS denying an immigrant's application for asylum or withholding of deportation.<sup>98</sup> The court stated that the IIRIRA altered the "availability, scope, and nature of judicial review in INS cases," but that because the alien's proceeding began before April 1, 1997 (the date that the IIRIRA was signed into law and became

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87. See *id.* at 1539.

88. See *id.*

89. See *id.*

90. See *id.*

91. *Id.* at 1541.

92. *Id.* at 1542.

93. See *id.*

94. 125 F.3d 889, 891 (5th Cir. 1997).

95. See *id.* at 891.

96. See *id.*

97. No. 97-9529, 1997 WL 616222 (10th Cir. Oct. 7, 1997).

98. See *id.* at \*1.

effective), judicial review was appropriate in this case.<sup>99</sup> Although the court reviewed this INS determination, it made clear that the IIRIRA would prohibit review of decisions made after April 1, 1997.<sup>100</sup>

In *Skutnick v. INS*,<sup>101</sup> the Seventh Circuit stated that the IIRIRA made significant changes to the availability of judicial review and required that "there shall be no appeal of any discretionary decision under [certain sections of the INA]. . . ."<sup>102</sup> An alien appealed an INS decision to deport him, claiming that "deportation would work an extreme hardship" by splitting up his family or by requiring him to relocate.<sup>103</sup> The court rejected the alien's argument that the Fifth Amendment entitled aliens to judicial review of all INS determinations and stated that the IIRIRA's preclusion of judicial review of INS decisions was constitutional.<sup>104</sup> The alien's petition was dismissed, his deportation order remained, and the new legislation was upheld.

As of late 1998, the Supreme Court has not addressed the validity of this legislation and the courts are clearly confused as to the state of the law. Courts have ruled that they lack jurisdiction to review orders of deportation under the AEDPA and IIRIRA.<sup>105</sup> Other courts have held that federal courts retain jurisdiction to hear immigrants' claims.<sup>106</sup> However, these same decisions glossed over the constitutionality of the legislation and were decided on other grounds.<sup>107</sup> Until the Supreme Court has ruled on the validity of this legislation, its constitutionality will remain in question.

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99. *Id.* at \*1 n.1.

100. *See id.*

101. 128 F.3d 512 (7th Cir. 1997) (quoting IIRIRA § 309(c)(4)(e)).

102. *Id.* at 513-514.

103. *Id.* at 513.

104. *See id.* at 514.

105. *See* *Dashto v. INS*, Nos. 97-1258, 97-1262, 1997 WL 577573, at \*1 (7th Cir. Sept. 12, 1997) (holding that the court lacks jurisdiction to review the INS order of deportation "when the alien requesting review was found deportable for having committed two or more crimes of moral turpitude not arising from a single scheme of criminal conduct and has been ordered to serve a prison term of one year or more").

106. *See* *Mojica v. Reno*, 970 F. Supp. 130, 157 (E.D.N.Y. 1997) (holding that the District Court retained jurisdiction under its general habeas corpus powers to hear the immigrants' challenge to the retroactive application of the AEDPA provision barring legal residents convicted of certain crimes from seeking discretionary waiver of deportation).

107. *See id.* at 182 (deciding that petitioners' equal protection claims should be dismissed as unnecessary for the disposition of the case at hand).

## III. REFORM

Although some courts have stated that the AEDPA leaves habeas corpus relief intact and that the new legislation does not infringe upon constitutional rights,<sup>108</sup> there is clearly a need for reform.<sup>109</sup> The laws, created to lower the costs of illegal immigration in this country, are too far reaching. The effects of the legislation create economic, social, and safety concerns for those seeking refuge in the United States.

Consider the true case of an Albanian asylum seeker who claimed to have been gang-raped in Albania in retaliation for her husband's refusal to fight for the Government. She fled to the United States in May of 1997.<sup>110</sup> While being detained in New Jersey, she failed to convince immigration officials that she had a good chance to win asylum.<sup>111</sup> The immigration officer who interviewed the woman before deportation determined that she had no credible fear of persecution, because she could not identify the men who raped her (she was blindfolded at the time of the attack).<sup>112</sup> The immigration judge who screened her also found no credible fear of persecution, although he did not substantively discuss the case with the woman's lawyer.<sup>113</sup> The woman was deported to Albania and was later found "dishelved and forlorn, on a street near the airport in Tirana, the capital of Albania, after her flight from Newark landed."<sup>114</sup> She was hidden by a generous family and was afraid to contact anyone in her own family in fear that the men who raped her would come after her again.<sup>115</sup> This woman should not have been deported from the United States. She should have been entitled, at the very least, to federal appellate review of the INS determination to remove her.

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108. See *Kolster v. INS*, 101 F.3d 785, 790 (1st Cir. 1996) (noting the position of the INS that the AEDPA repeals habeas relief available in the INA, but leaves relief protected by the Constitution intact); *Hincapie-Nieto v. INS*, 92 F.3d 27, 30-31 (2d Cir. 1996) (stating the same relief is available); *Morrison*, *supra* note 73, at 702-04 (stating that a majority of circuit court decisions upholding AEDPA § 440(a) have held that the section does not remove all access to habeas corpus relief for deportable aliens).

109. It should be noted that IIRIRA § 306(a), which was enacted months after the decisions regarding the constitutionality of AEDPA § 440(a), discussed *supra* note 74, further restricts habeas relief. Thus, one should view these opinions in light of the more recent reform.

110. See *Dugger*, *supra* note 12, at A1.

111. See *id.*

112. See *id.*

113. See *id.*

114. *Id.*

115. See *id.*

The laws should be changed to allow judicial review of INS removal determinations. Extreme hardships imposed by the new laws on many aliens and their families outweigh the costs to American citizens.<sup>116</sup>

Congress has an obligation to remedy its mistake, listen to reason, and conform immigration law in the United States to constitutional and international law. Repeal of the laws in their entirety would provide aliens with more procedural protections<sup>117</sup> but might result in more public outcry and another set of bad laws. The better solution is to amend the current law.

Congress should amend the IIRIRA and AEDPA to conform the laws to the United States' international obligations as established under the Refugee Convention<sup>118</sup> and Refugee Protocol.<sup>119</sup> This could be easily accomplished by amending IIRIRA section 305 to give the Attorney General the discretion to withhold deportation. This small change would allow the Attorney General to enforce the *nonrefoulement* provision of Article 33 of the Convention. The Attorney General could ensure that the United States does not return a person classified as a refugee to a country where his life or freedom is threatened.

Congress should also amend IIRIRA section 321(a)(3) to eliminate the harsh retroactive application of deportation of aggravated felons. Currently, removal proceedings for aggravated felons are expedited and reentry is forbidden for 20 years.<sup>120</sup> By eliminating this retroactive application, Congress could avoid violating refugees' international human rights and their reliance on old immigration law.

Finally, Congress should reassert federal judicial review of INS deportation decisions and should ensure that all aliens have the right to trials and/or administrative hearings. By eliminating the summary exclusion procedures of IIRIRA section 302, Congress can guarantee that the INS does not circumvent aliens' rights to procedural due process. By amending section 306 of the IIRIRA

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116. See Underwood, *supra* note 3, at 926.

117. If the new laws were repealed or struck down by the Supreme Court, procedural protections, such as a return of the withholding discretion of the Attorney General and the right to federal judicial review of deportation decisions (as prescribed by the INA and immigration legislation enacted before the AEDPA and IIRIRA), would be returned to many classes of aliens who are now being denied such protections, as this Note has discussed. Total repeal might lead to public outrage, however, which was the impetus of the original enactment of the legislation. See Underwood, *supra* note 3, at 1 (stating that it was public backlash against the growing population of illegal residents that prompted the legislation).

118. See Refugee Convention, *supra* note 37.

119. See Refugee Protocol, *supra* note 36.

120. See Converse, *supra* note 17, at 12.

and section 440(a) of the AEDPA, Congress can ensure that all aliens have the right to seek review of deportation orders in U.S. courts.

The primary reason that these laws were adopted was to deter illegal immigration to the United States by (1) increasing border patrols; (2) increasing penalties for smuggling and document fraud; (3) reforming exclusion and deportation laws; and (4) improving the verification system for eligibility for employment.<sup>121</sup> These measures were aimed at reforming the legal immigration system and facilitating legal entries into the United States.<sup>122</sup> The primary purposes need not change. However, the laws need to be amended where they reflect destructive motives and are punitive, rather than deterrent, in nature.

### CONCLUSION

As American Bar Association Governmental Affairs Director Robert D. Evans wrote to members of the House and Senate and to President Clinton immediately before the final passage of the legislation, “[the new legislation] abandons the U.S. commitment to the protection of refugees seeking asylum, threatens basic safeguards of due process, and eliminates the historic role for [sic] the judiciary in reviewing the implementation of the immigration laws.”<sup>123</sup> Congress ignored this warning. The laws need to be reformed. This is not a cry for a total repeal or an extensive overhaul of U.S. immigration law. This is simply a call for reason. The three changes suggested above would provide aliens the U.S. Constitutional and international law protections they are guaranteed.

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121. See H.R. CONF. REP. NO. 104-828, at 1 (1996) (stating reasons for adopting these laws).

122. See *id.*

123. Wolchok, *supra* note 66, at 13.

